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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RITA BASTIEN, Plaintiff - Appellant, v. THE OFFICE OF SENATOR BEN NIGHTHORSE CAMPBELL, Defendant - Appellee, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; AARP; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, PROJECT ON GOVERNMENT OVERSIGHT; and PUBLIC CITIZEN, INC., Amici Curiae.	No. 02-1343

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. NO. 01-WY-799-CB(OES))

Before **SEYMOUR, BALDOCK,** and **HARTZ,** Circuit Judges.

HARTZ, Circuit Judge.

Our Constitution's Speech or Debate Clause states that "for any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place." U.S. Const. art. I, § 6, ¶ 1. The issue before us is whether this Clause precludes Plaintiff Rita Bastien's employment-discrimination claim brought under the Congressional Accountability Act of 1995 (the CAA). Senator Ben Nighthorse Campbell fired Plaintiff from her position on his staff. Her duties included meeting with the public to obtain information used by the Senator for both constituent services and his legislative agenda. We hold that suit is not barred because the claim does not question the conduct of official Senate legislative business by Senator Campbell or his aides. We do not address, however, whether certain evidence may be inadmissible in this litigation because it concerns such conduct.

I. The Congressional Accountability Act

The CAA, 2 U.S.C. § 1301 *et seq.*, extends the protections of 11 major workplace statutes to congressional employees. *See* § 1302(a)(1)–(11). It creates the Office of Compliance (OOC), an independent office within the legislative branch. *See id.* § 1381. The OOC has a five-member Board of Directors, appointed jointly by the Speaker of the House, the Senate Majority Leader, and the Senate and House Minority Leaders. *See id.* § 1381(b). "In addition to promulgating rules for implementation of the eleven statutes, the OOC oversees a complaint procedure that provides for counseling, mediation, formal hearings and decisions by a hearing officer, and appeal to the Board of Directors." James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 Harv. J. Legis. 1, 9 (1999). *See generally* Sandra Mazliah, *The Congressional Accountability Act of 1995: Meandering the Mandatory Administrative Maze*, 6 Fed. Cir. B.J. 5 (1996). The CAA provides for judicial review, *see* 2 U.S.C. §1407, and it allows plaintiffs to opt out of some Board proceedings and instead file suit in federal district court. *See id.* §§ 1404, 1408; *Brudney*, *supra*, at 9-10.

Under the CAA a plaintiff may file a complaint only against the employing office, not the individual member of Congress. *See* 2 U.S.C. §§ 1405(a) & 1408(b). The Office of House Employment Counsel, *see id.* § 1408(d), or the Senate Chief Counsel for Employment represents the office, *Brudney*, *supra*, at 10 n.46; and damages are paid from funds appropriated into the OOC's Treasury account. *See* § 1415(a). Of particular relevance to our case, the CAA explicitly

retains Speech or Debate Clause immunity for members of Congress, *see* § 1413, thereby avoiding any issue regarding whether Congress as a whole can waive such immunity for individual members.

II. Factual and Procedural Background

Plaintiff worked for six years—from July 7, 1994, to September 4, 2000—as a Senate Aide in Senator Campbell's Englewood, Colorado, office. On September 5, 2000, at the age of 61, she was transferred to the Senator's Colorado Springs office, where she was a District Director. On April 10, 2001, she was terminated.

Plaintiff sued Senator Campbell's office (the Office) under the CAA on April 30, 2001, alleging age discrimination and retaliation for discrimination complaints. She alleged that the discrimination began several months before her transfer to Colorado Springs and continued until her termination.

The Office moved to dismiss the suit under Fed. R. Civ. P. 12(b)(1), contending that the Speech or Debate Clause barred federal subject matter jurisdiction over the case, and that the claim should be dismissed on the ground of sovereign immunity. The Office asserted that "Plaintiff's duties of meeting with constituents, gathering information for the Senator, discussing constituent suggestions and then conveying them to the Senator, constitute actions that directly relate to the due functioning of the legislative process," *Bastien v. Campbell*, 209 F. Supp. 2d 1095, 1101 (D. Colo. 2002), and accordingly should be shielded from judicial scrutiny by the Speech or Debate Clause. Plaintiff responded that "her actions were political rather than legislative in nature, and that although she met with

constituents to discuss certain issues, she never performed legislative functions." Id.

The district court granted the Office's motion to dismiss. *Id.* It held that "the Speech or Debate Clause provides immunity to Members of Congress and their aides for personnel actions taken with respect to employees whose duties are directly related to the due functioning of the legislative process[.]" *Id.* at 1103. It then found that "the majority of Plaintiff's job duties . . . were directly related to the due functioning of the legislative process." *Id.* at 1104.

The court characterized Plaintiff's job responsibilities in the Englewood office as follows:

> Plaintiff's interaction with constituents and her attendance at various meetings and congressional hearings on behalf of the Senator illustrates that Plaintiff's duty was not only to provide Senator Campbell with information, but to take action on behalf of the Senator and provide him with recommendations on various legislative issues and agendas.

Id. at 1105. It described her job responsibilities in the Colorado Springs office as including "gathering and conveying to Senator Campbell himself, and to the Defendant, information critical to the Senator's legislative agenda." *Id.* at 1106. The court concluded that "the personnel actions taken by [the Office] against the Plaintiff are afforded Speech or Debate Clause immunity." *Id.* at 1104.

Plaintiff appeals this ruling. We reverse and remand to allow the suit to proceed.

III. The Speech or Debate Clause

The first paragraph of Article I, § 6 of the Constitution states:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S.C.A. Const. art. I § 6, ¶ 1. On its face the Speech or Debate Clause would not appear to apply to a Senator's conduct with respect to his employees. It appears to protect only the Senator's remarks on the Senate Floor. But the Supreme Court has long treated the Clause as constitutional shorthand for a more extensive protection.

The Office contends that this protection encompasses "personnel actions taken against employees whose job duties directly relate to the due functioning of the legislative process." Aplee. Br. at 41 (capitalization omitted). In its view, Plaintiff was such an employee, so her claim is constitutionally barred.

We disagree. As we read the Supreme Court's opinions on the Speech or Debate Clause, the Clause protects only "legislative" acts by a member of Congress or an aide, and only official, formal acts (or perhaps their functional equivalent) deserve the adjective "legislative."

In particular, Plaintiff's informal contacts with constituents and other sources of information and opinion were not legislative in nature. Because Plaintiff's duties were not legislative and personnel actions allegedly taken against her were not in themselves legislative, her CAA claim can proceed.

Our conclusion follows from a careful review of Supreme Court precedent. We now proceed to summarize the Court's opinions to establish that the Office's contentions go beyond any holding and are inconsistent with the Court's explanations of its holdings.

The Court's first pronouncement on the Clause was in *Kilbourn v. Thompson*, 103 U.S. 168 (1880). First, *Kilbourn* held that a committee investigation exceeded the constitutional powers of the House of Representatives and hence ruled invalid a House order declaring a witness in contempt for violating a subpoena duces tecum issued by the committee. It reinstated the witness's claim against the House sergeant at arms for falsely arresting him in accordance with the order. *See id.* at 170-77, 205. Then, however, the Court held that the Speech or Debate Clause protected against suit the members of Congress responsible for the order.

The Court said that "it may be reasonably inferred that the framers of the Constitution meant the same thing" as what Lord Denman had said in construing the British Parliamentary privilege from which the Clause was derived:

> The privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that

> princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, *whatever is done within the walls of either assembly must pass without question in any other place.* For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For every paper signed by the speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So if the speaker by authority of the House order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer.

Id. at 202 (quoting *Stockdale v. Hansard,* 9 Ad. & E. 1, 112 Eng. Rep. 1112 (K.C. 1839) (emphasis added)). Accordingly, the Court construed "Speech or Debate" broadly, writing:

> It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its

> committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, *to things generally done in a session of the House by one of its members in relation to the business before it.*

Id. at 204 (emphasis added).

To say that "Speech or Debate in either House" is to be construed broadly is not, however, to say that it should be cast free from its mooring. In particular, it should not be, and has not been, read to make members of Congress into a special class of citizens protected from suit (or prosecution) arising out of any activity that could assist in the performance of their official duties. After all, virtually anything that a member of Congress does could be said to relate, more or less directly, to official business (*e.g.*, causing an accident when speeding to attend a constituent's dinner party). And although any suit or prosecution against a member of Congress could improperly influence the member in the conduct of official duties, the Clause does not protect against all such intrusions. The Supreme Court's jurisprudence indicates that the Clause's protection is limited to the conduct of official business of the member's chamber. Other activities by members are "political" rather than "legislative," however important they may be. In other words, "Speech or Debate" has been interpreted broadly to encompass voting, issuing reports, and other formal activity, but the phrase "in either House" that immediately follows "Speech or Debate" has limited the protection to official conduct. Thus, *Kilbourn* described the protection of the Clause as limited "to things

generally done *in a session of the House* by one of its members in relation to the business before it." *Id.* at 204 (emphasis added). Later opinions continued this theme.

After *Kilbourn* the Supreme Court did not address the Speech or Debate Clause for another 70 years. The issue in *Tenney v. Brandhove*, 341 U.S. 367 (1951), was whether a civil rights claim could be brought against several state legislators for conducting a committee hearing to inquire into statements made by the plaintiff, himself a state legislator. *Id.* at 370-71. The Court held that the Congress that enacted the civil rights legislation could not have intended that law to impinge on the traditional privilege of legislators expressed at the national level in the Speech or Debate Clause. *Id.* at 376. The Court noted that "[i]nvestigations, whether by standing or special committees, are an established part of representative government," *id.* at 377, and ruled against the plaintiff because the committee investigation had not "exceeded the bounds of legislative power," *id.* at 378. In other words, "Speech or Debate in either House" includes questioning witnesses in committee meetings.

United States v. Johnson, 383 U.S. 169, 185 (1966), added two important glosses to the Clause. First, the Court held that the Clause protects not only the "legislative acts of [a] member of Congress," but also the member's "motives for performing them." Second, it held that even though the Clause may not bar a particular prosecution altogether, it could preclude use of certain evidence. Johnson, a former Congressman, had been convicted of violating and conspiring to violate the federal conflict-of-interest statute by his efforts to influence the Department of Justice to dismiss an indictment against a loan company and its officers. *Id.* at 171. One part of that effort was his delivery of a speech

on the House floor favorable to the loan company. *Id.* at 172. The Court found that proper application of the Clause required exclusion from trial of evidence relating to Johnson's floor speech, the manner of its preparation, and his motives for making it. *Id.* at 173-76. Certainly, the consideration of such evidence at trial amounted to "questioning" a member of Congress concerning a Speech or Debate in the member's House. The Court rejected the Government's argument that the Clause "was meant to prevent only prosecutions based upon the 'content' of speech, such as libel actions, but not those founded on 'the antecedent unlawful conduct of accepting or agreeing to accept a bribe.'" *Id.* at 182 (quoting brief of the United States). It also rejected the contention that the Clause "was not violated because the gravamen of the count was the alleged conspiracy, not the speech." *Id.* at 184. Although affirming the Court of Appeals' reversal of the convictions, the Court remanded to permit a new trial at which the prohibited evidence would be excluded. *Id.* at 185. The Court refused to bar the prosecution altogether. In particular, in accord with *Kilbourn*'s view of the scope of the Clause, it would not construe the Clause to provide a privilege with respect to contacts with executive agencies. The Court wrote, "[T]he attempt to influence the Department of Justice . . . in no wise related to the due functioning of the legislative process." *Id.* at 172.

Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam), reaffirmed *Kilbourn* in providing Speech or Debate Clause protection for issuance of congressional subpoenas—in that case, a subpoena "validated by subsequent Subcommittee ratification," *id.* at 84. The Court further stated that "legislators engaged in the sphere of legitimate legislative activity should be

protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Id.* at 85 (internal quotation marks and citation omitted). Counsel for the committee, however, was not protected by the Clause with respect to his actions preceding issuance of the subpoena. *Id.* He had allegedly conspired with state officials to violate Dombrowski's civil rights in obtaining the records that were then subpoenaed by the committee.

Although *Powell v. McCormack*, 395 U.S. 486 (1969), is best remembered for holding that the House of Representatives improperly excluded Mr. Powell after his election in 1966, it also raised issues of Speech or Debate Clause immunity with respect to Members of the House and its employees. The Court determined that "[a]lthough this action should be dismissed against respondent Congressmen [for voting for exclusion], it may be sustained against their agents." *Id.* at 550. *But see id.* at 501-02 (stating that Court need address only whether the defendant House employees could be sued even if the Congressmen were protected). The Court rejected the defendant employees' attempt to distinguish the rulings against congressional employees in *Kilbourn* and *Dombrowski* on the grounds that the prior cases "concerned an affirmative act by the employee outside the House having a direct effect upon a private citizen," *id.*, at 504, and that they had involved suits for damages rather than the "assertedly greater interference with the legislative process" in *Powell*, in which the plaintiff sought disbursement of funds (salary) by the Sergeant at Arms, *id.* Otherwise, *Powell* does not appear to have broken any new ground with respect to Speech or Debate Clause protection.

The next Court opinion on the Clause, *United States v. Brewster*, 408 U.S. 501 (1972), is of particular importance to this case because of its elaboration on the meaning of "legislative acts." Brewster was a former Senator charged with accepting a bribe in exchange for promising to cast a particular vote. The Court overturned the dismissal of the indictment. It distinguished *Johnson* on the ground that there was "no need for the Government to show that [Brewster] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise." *Id.* at 526. It said that *Johnson* stands for the proposition "that a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts." 408 U.S. at 512. It further explained: "A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *Id.*

The Court then pointed out that much of the work of Senators and Representatives does not qualify for protection:

> It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in

> securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. *Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases.* But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.

Id. (emphasis added).

The Court refused to accept what it considered an overly expansive construction of the Speech or Debate Clause. It adopted the approach of Justice Brandeis for the Court in *Long v. Ansell*, 293 U.S. 76 (1934). *Long* had rejected a broad interpretation of the congressional immunity from arrest provided by Article I, Section 6, because that Clause's "language is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant," *id.* at 82 (quoted by *Brewster,* 408 U.S. at 521).

Thus, *Brewster* rejected the view that the Clause protects "all conduct 'related to the due functioning of the legislative process.'" *Brewster*, 408 U.S. at 513 (quoting *Johnson*, 383 U.S. at 172). The Court said that Senator Brewster had read out of context the passage

quoted from *Johnson* and that *Johnson* actually had held "that only acts generally done in the course of the process of enacting legislation were protected." *Brewster*, 408 U.S. at 514. Contrary to Senator Brewster's argument, "[i]n no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process." *Id.* at 515-16 (footnotes omitted). The Court concluded its rejection of a "related-to" reading by pointing out the dangers of an excessive expansion of Speech or Debate Clause immunity:

> We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to "relate" to the legislative process. Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility.

Id. at 516.

On the same day as *Brewster*, the Court also decided *Gravel v. United States,* 408 U.S. 606 (1972), in which it considered the Speech or Debate Clause in the context of Senator Gravel's disclosure of the Pentagon Papers. The Court took the opportunity to explain the circumstances in which members of Congress are protected by the Clause with respect to acts by their aides. It did not, however, clearly expand protection in any other dimension.

The case arose out of a subpoena to Senator Gravel's aide, Leonard S. Rodberg, issued by a federal grand jury investigating possible criminal misconduct associated with public release of the documents. One evening Senator Gravel had convened a meeting of a Senate subcommittee he chaired, where he read portions of the Pentagon Papers and placed all 47 volumes in the public record. Rodberg had been added to the Senator's staff earlier that day and had assisted in the preparation and conduct of the hearing. A number of days after the hearing, press reports indicated that Senator Gravel had arranged for a private company to publish the papers. *Id.* at 608-10.

The Court thought it "incontrovertible" that the Senator could not be questioned about events at the subcommittee hearing. *Id.* at 615. It then extended that protection to Rodberg's involvement, stating that "the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Id.* at 618. It explained that such aides must be treated as alter egos of the Member because "the day-to-day work of such aides is so critical to the Members' performance." *Id.* at 616-17. It being "literally impossible, in view of the complexities of the

modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants," *id.* at 616, it follows that to deny the aides' acts the protection of the Clause would "inevitably . . . diminish[] and frustrate[]" the "central role of the . . . Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *id.* at 617. The privilege, however, belongs to the Senator, who can waive an aide's claim of protection. *See id.* at 622 n.13. One could say that the aide's actions are treated, for sound reasons of policy, as the functional equivalent of actions by the member of Congress.

The Court discussed at some length its earlier decisions in *Kilbourn*, *Dombrowski*, and *Powell*, in which members of Congress were held to be protected by the Speech or Debate Clause while their aides were nevertheless subject to liability. The Court found those cases distinguishable because the aides had not performed legislative acts. The discussion provides a further gloss on the Court's view of what actions are "legislative" and thus protected by the Clause. The Court wrote:

> The three cases reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings. In *Kilbourn*, the Sergeant-at-Arms was executing a legislative order, the issuance of which fell within the Speech or Debate Clause; in

> [*Dombrowski*], *the committee counsel was gathering information for a hearing*; and in *Powell*, the Clerk and Doorkeeper were merely carrying out directions that were protected by the Speech or Debate Clause. In each case, protecting the rights of others may have to some extent frustrated a planned or completed legislative act; but *relief could be afforded without proof of a legislative act* or the motives or purposes underlying such an act. No threat to legislative independence was posed, and Speech or Debate Clause protection did not attach.

Id. at 620-21 (emphasis added). We emphasize that the Court viewed "gathering information for a hearing" in *Dombrowski* as not being a legislative act.

The Court further explained the meaning of "legislative act" in holding that the Speech or Debate Clause afforded no protection with respect to arrangements for private publication of the Pentagon Papers. *Id.* at 622. Relying on English precedents, the Court extended the Clause's protection of republications only so far as official committee reports. *Id.* at 623-24. The Court said that "private publication . . . was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence." *Id.* at 625. Also, it appeared that "neither Congress nor the full committee ordered or authorized the publication." *Id.* at 626. The Court said that it could not "but conclude that the Senator's arrangements with [the private publisher] were not part and parcel of the legislative process." *Id.*

More broadly, said the Court: "That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Id.* at 625. It elaborated:

> Legislative acts are not all-encompassing. *The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.* As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but only when necessary to prevent indirect impairment of such deliberations.

Id. (internal quotation marks and citation omitted) (emphasis added).

Based on these general principles, the Court held that no "constitutional or other privilege . . . shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions." *Id.* at 628. Then it held that a protective order

> would afford ample protection for the [Speech or Debate Clause] privilege if it forbade questioning any witness, including Rodberg: (1) concerning the Senator's conduct, or the conduct of his aides, at the June 29, 1971, meeting of the subcommittee; (2) concerning the motives and purposes behind the Senator's conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator; (4) except as it proves relevant to investigating possible third-party crime, concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, in preparation for the subcommittee hearing.

Id. at 628-29 (footnote omitted).

Strangely, the Court did not state that all this protection was required—it just said that the order would provide "ample protection." *Id.* at 628. This peculiar language may have been appropriate because some of the limitations in the order could be justified on grounds other than the Speech or Debate Clause—for example, a grand jury's authority is generally limited to investigating only *crime*—and those other grounds provided, in the context of that case, at least as much protection as the Clause in certain areas.

Further hampering an understanding of the reach of the Clause under *Gravel* is the uncertainty regarding the scope of the protection with respect to all noncriminal

acts performed by the Senator's aides "in the course of their employment, in preparation for the subcommittee hearing," *id.* at 629. This protection is not explored in the opinion. In particular, the scope of "preparation" for a hearing, which could include virtually any work by an aide, is left unspecified. Perhaps such specificity was unnecessary in that case because Rodberg had been an aide for only a few hours before the hearing. In any event, despite *Gravel*'s expansive construction of the Clause to protect certain activity of congressional aides, it still confined protection to activity closely and directly tied to the conduct of official legislative business.

In *Doe v. McMillan*, 412 U.S. 306 (1973), the Court considered a suit by persons allegedly defamed by a committee report publicly disseminated by the Government Printing Office. The Court held that the Speech or Debate Clause barred the claim "insofar as it sought relief from the Congressmen-Committee members, from the Committee staff, from the consultant, or from the investigator, for introducing material at Committee hearings that identified particular individuals, for referring the report that included the material to the Speaker of the House, and for voting for publication of the report." *Id.* at 312. Distribution of the report within Congress itself was also protected. *See id.* The necessity or relevance of disclosure in the report of the allegedly defamatory matter was not a proper subject of inquiry under the Clause. *See id.* at 312-13. At the same time, however, the Court held that the Clause "does [not] immunize those who publish and distribute otherwise actionable materials beyond the reasonable requirements of the legislative function." *Id.* at 315-16. Although the Court indicated that perhaps a showing could be made that some public dissemination of the materials might

have been necessary "in order [for Congress] to perform its legislative function," *id.* at 317—in which case the dissemination would be protected by the Speech or Debate Clause—it failed to provide specific guidance on how to resolve the matter on remand.

In *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), the Court clarified that the Speech or Debate Clause protects not only votes to authorize committee investigations but also issuance of subpoenas in the exercise of that authorization. *Id.* at 505. The Court wrote that "[i]n determining whether particular activities other than literal speech or debate fall within the 'legitimate legislative sphere' we look to see whether the activities took place 'in a session of the House by one of its members in relation to the business before it.'" *Id.* at 503 (quoting *Kilbourn*, 103 U.S. at 204). "The power to investigate and to do so through compulsory process plainly falls within [*Gravel*'s] definition [of the legitimate legislative sphere]." *Id.* at 504. "[T]he power to investigate is inherent in the power to make laws." *Id.* The "investigation at issue [was] related to and in furtherance of a legitimate task of Congress." *Id.* at 505. Not only were the Committee members immune from suit, but so was the Committee's Chief Counsel. *See id.* at 507.

United States v. Helstoski, 442 U.S. 477 (1979), removed any doubt that evidence of legislative acts cannot be introduced into evidence for *any* purpose. Former Congressman Helstoski was prosecuted for allegedly accepting bribes in return for promising to introduce private bills granting resident status to aliens. The issue was the extent to which the Speech or Debate Clause required exclusion of evidence the Government sought to offer during trial. The Government

"contend[ed]that the Speech or Debate Clause does not bar the introduction of all evidence referring to legislative acts . . . [and] argue[d] that the Clause does not prohibit it from introducing evidence of discussions and correspondence which describe and refer to legislative acts if the discussions and correspondence did not occur during the legislative process." *Id.* at 486. The Government said that it "s[ought] to introduce such evidence to show Helstoski's motive for taking money, not to show his motive for introducing the bills." *Id.* Following *Johnson* and *Brewster*, the Court largely rejected the Government's argument, stating that those precedents "leave no doubt that evidence of a legislative act of a Member may not be introduced by the Government." *Id.* at 487. It reiterated that "[t]he Clause protects 'against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.'" *Id.* at 489 (quoting *Brewster*, 408 U.S. at 525). It noted, however, that "[a] promise to deliver a speech, to vote, or to solicit other votes at some future date is not 'speech or debate,' [nor is] a *promise* to introduce a bill . . . a legislative act." *Id.* at 490.

The most recent Supreme Court opinion on the Speech or Debate Clause was handed down a quarter-century ago. In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the source of Senator Proxmire's problem was not alleged criminality but an allegedly libelous attempt at humor. The Senator's Golden Fleece Award publicized expenditures of taxpayer money he considered wasteful. Plaintiff Hutchinson received the award for his research on anger in animals. Senator Proxmire entered his comments in the Congressional Record and then referred to the award in newsletters to his constituents and others. In addition, he referred to the research in a television

interview, and his aide contacted federal agencies that had supported the research. *See id.* at 114-17.

The Court denied Senator Proxmire the protection he sought under the Speech or Debate Clause: "A speech by Proxmire in the Senate would be wholly immune and would be available to other Members of Congress and the public in the Congressional Record. But neither the newsletters nor the press release was 'essential to the deliberations of the Senate' and neither was part of the deliberative process." *Id.* at 130. The Court acknowledged that it had given the Speech or Debate Clause "a practical rather than a strictly literal reading which would limit the protection to utterances made within the four walls of either Chamber. Thus, we have held that committee hearings are protected, even if held outside the Chambers; committee reports are also protected." *Id.* at 124. But, it continued, "[t]he gloss going beyond a strictly literal reading . . . has not . . . departed from the objective of protecting only legislative activities." *Id.* at 125. The Clause reaches only matters that are "'*an integral part of the deliberative and communicative processes* by which Members participate *in committee and House proceedings* with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.'" *Id.* at 126 (quoting *Gravel*, 408 U.S. at 625). This view conforms to that of Justice Joseph Story, who wrote: "[T]his privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty." J. Story, Commentaries on the Constitution § 863 at 329 (1st ed. 1833) (Story) (quoted by *Proxmire*, 443 U.S. at 126).

Even accepting Senator Proxmire's contention that newsletters and press releases "exert some influence on other votes in the Congress and therefore have a relationship to the legislative and deliberative process," *id.* at 131, the Court said such a relationship was insufficient to trigger Speech or Debate Clause protection. It noted that in *Brewster* it "had carefully distinguished between what is only 'related to the due functioning of the legislative process,' and what constitutes the legislative process entitled to immunity under the Clause." *Id.* (quoting *Brewster*, 408 U.S. at 512). Although Congress's informing itself through hearings is a legislative function protected by the Clause, "the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process." *Id.* at 133. "Newsletters and press releases . . . are primarily means of informing those outside the legislative forum; they represent the views and will of a single Member. It does not disparage either their value or their importance to hold that they are not entitled to the protection of the Speech or Debate Clause." *Id.* Of particular relevance here, the Court distinguished Proxmire's actions from "congressional efforts to inform itself *through committee hearings*[, which] are part of the legislative function." *Id.* at 132-33 (emphasis added).

This survey of Supreme Court opinions reveals several continuing themes in the interpretation of the mandate, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, ¶ 1. First, in light of the history and undoubted purpose of the Clause, the words "Speech or Debate" have been read broadly to

encompass all formal actions in the official business of Congress, including voting, conducting hearings, issuing reports, and issuing subpoenas. *See, e.g.*, *Kilbourn*, *Tenney*, *Powell*, *Gravel*, *Doe*, and *United States Servicemen's Fund*.

Second, in recognition of the needs of a large and overburdened legislative body, the Court has extended the meaning of some terms in the Clause to include their functional equivalents. Thus, "Senators and Representatives" includes aides who function as their alter egos in performing legislative acts. *See Gravel*, 408 U.S. at 616-17; *Doe*, 412 U.S. at 312; *United States Servicemen's Fund*, 421 U.S. at 507. And committee hearings are deemed "in" the House even when conducted far away. *See Proxmire*, 443 U.S. at 124.

Third, an act is "questioned" not only if it is the subject of civil or criminal prosecution but even if evidence of the act is offered at a trial. *See Johnson*, *Helstoski*.

Fourth, and most important for this appeal, the above "broad" constructions of the Speech or Debate Clause have always been confined within the limits of formal, official proceedings. This limitation has been recognized from *Kilbourn*, 103 U.S. at 204 (describing object of Clause as "things generally done in a session of the House by one of its member in relation to the business before it") to *Johnson*, 383 U.S. at 172 (attempts to influence executive agency are outside Clause's scope) to *Brewster*, 408 U.S. at 512 (the "Clause prohibits inquiry only into those things generally said or done in the House or Senate in the performance of official duties and into the motivation for those acts"), to *Gravel*, 408 U.S. at 625 ("[i]nsofar as the Clause is construed to reach

other matters [than speech or debate in either House], they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House"), and to *Proxmire*, 443 U.S. at 126 ("this privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty" (quoting Story)). The expression summarizing this proposition is that the Clause protects only "legislative," not "political," acts. *See Brewster*, 408 U.S. at 512.

We now turn to the specifics of the case before us.

IV. Application to this Case

As we understand the Supreme Court's jurisprudence on the Speech or Debate Clause, the immunity issue before us turns on whether Plaintiff's lawsuit questions "legislative" action by Senator Campbell or Plaintiff. In our view, it does not.

First, the alleged discriminatory acts by the Senator were not legislative acts. No official Senate action, such as a vote or a subpoena, was involved. None of the Senator's alleged misconduct took place "in either House" of Congress, either literally or constructively (as might be the case when a subcommittee conducts hearings in the hinterlands).

Indeed, even if there had been a legislative act—say, a committee resolution—directing a discriminatory action against Plaintiff, only the vote itself would be protected by the Speech or Debate Clause. Plaintiff could still pursue a claim for being removed from the payroll or being mistreated by supervisors. In *Powell* the House of Representatives in effect fired a member of its own body. Those who voted to exclude Powell were protected by the Speech or Debate Clause. But its agents—including those who handled payrolls—were subject to suit. Thus, in the case before us, Defendant—the Office of Senator Campbell—could be liable for a discriminatory action against Plaintiff even if the action was authorized or directed by immunized legislative votes.

Second, Plaintiff's discrimination claim does not require proof of any legislative act by Senator Campbell or any member of his staff. Defendant has not pointed to, or even suggested, that Plaintiff would need to prove that Senator Campbell cast a particular vote, subpoenaed a witness, or took part in any other official Senate or Senate committee action. What Defendant does suggest is that meetings with constituents or other members of the public—either by the Senator himself or by his aides—are legislative acts to the extent that information is gathered that could affect his votes or his efforts to craft proposed legislation. In support of this position Defendant cites language in the Supreme Court's decisions in *Doe*, *United States Servicemen's Fund*, and *Proxmire*, stating that gathering information was a legislative act. In each of these cases, however, the information gathering being addressed was in the course of formal committee action, when the committee had subpoenaed witnesses or disclosed information during a

hearing. No Supreme Court opinion indicates that Speech or Debate Clause immunity extends to informal information gathering by individual members of Congress. On the contrary, *Gravel* summarized the nonimmunized civil complaint against the committee counsel in *Dombrowski* as "charg[ing] [him] with conspiring with state officials to carry out an illegal seizure of records that the Committee sought for its own proceedings," *Gravel*, 408 U.S. at 619—surely an information-gathering function. *Gravel* explained that even though "the committee counsel was gathering information for a hearing[,] . . . relief could be afforded [to those suing the counsel] without proof of a legislative act or the motives or purposes underlying such an act." *Id.* at 620-21. The Court's discussions in its opinions of the importance of information gathering is for the purpose of establishing that such activity is a proper congressional function and, when conducted by a committee, should be treated just as voting and debating legislation. To extend protection to informal information gathering—either personally by a member of Congress or by congressional aides—would be the equivalent of extending Speech or Debate Clause immunity to debates before local radio stations or Rotary Clubs.

The only potential support for Defendant's views on this matter that we can find in the Supreme Court's opinions is the statement in *Gravel* that a protective order "would afford ample protection for the [Speech or Debate Clause] privilege if it forbade questioning any witness . . . concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, *in preparation for the subcommittee hearing*." 408 U.S. at 628-29 (emphasis added). Perhaps the Court is saying that information gathering targeted to

a specific hearing is activity privileged under the Clause. But the Court failed to expand on the matter, and other language in *Gravel*, particularly the discussion of *Dombrowski* summarized above, strongly suggests otherwise. The issue was not clearly presented in *Gravel* because the staff member who acquired the information—the Pentagon Papers—had only been hired on the day of the hearing. In any event, the unexplained statement in *Gravel* is insufficient ground for us to stretch the meaning of "Speech or Debate in either House" to include the everyday task of gathering views and information from constituents and others through informal contacts.

Aside from reliance on the Speech or Debate opinions of the Supreme Court, Defendant also points to the immunity granted the President. In *Nixon v. Fitzgerald*, 457 U.S. 731(1982), the Supreme Court recognized "absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.* at 756. Fitzgerald had been terminated from his Air Force position "in the context of a departmental reorganization and reduction in force, in which the job was eliminated." *Id.* at 733-34. He alleged that the reorganization was a ruse and that he was actually terminated in retaliation for his truthful testimony before a congressional committee. *See id.* at 736. Holding that the President had "the authority to prescribe reorganizations and reductions in force" within the Air Force, the Court "conclude[d] that [the President's] alleged wrongful acts lay well within the outer perimeter of his authority." *Id.* at 757.

Fitzgerald hardly compels a conclusion that members of Congress have an absolute immunity from similar suits by their staff assistants. It is not enough to

argue that if the head of one of the three branches of government has absolute immunity in personnel matters, then so do the heads of a coequal branch. To be sure, any imposition of liability on a public official may impair that official's performance of official duties; lawsuits by former employees can consume time and energy, and the prospect of such suits may deter the official from discharging an employee whose incompetence diminishes the official's own efficiency and effectiveness. But *Fitzgerald* made clear that determining whether to recognize an absolute immunity requires balancing such interests against the interests of those who have been wronged. *See id.* at 744-48. And recognition of the President's absolute immunity derived from "[t]he President's *unique* status under the Constitution." *Id.* at 750 (emphasis added). The Court said that "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government," *id.* at 751, and "the sheer prominence of the President's office" makes him "an easily identifiable target for suits for civil damages," *id.* at 752-53. Surely these considerations also weigh heavily in the context of high ranking executive officials, such as governors and cabinet officers; but the Court viewed decisions giving such officials only a qualified immunity "to be inapposite." *Id.* at 750.

Prominent as members of Congress are, the threat to the performance of their duties arising from employment litigation is nothing like what would confront the President. It is worth observing that the third branch of government, the judiciary, is not entitled to absolute immunity in making employment decisions. *See Forrester v. White*, 484 U.S. 219 (1988). Moreover,

Congress itself, at least in 1995, apparently did not believe it required such protection. It limited the reach of the CAA only insofar as the Speech or Debate Clause provided immunity, and the case law at that time hardly provided much ground for reliance on the Clause in the personnel arena. A truly concerned Congress would likely have enacted a specific protection in the CAA. Defendant would have a stronger argument if the cause of action here were not one created by Congress. Indeed, the absolute- privilege holding in *Fitzgerald* was limited to "'implied' causes of action [and did] not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President . . . ." *Fitzgerald*, 457 U.S. at 748 n.27.

In any event, Defendant relies solely on the Speech or Debate Clause itself. And whatever the strength of policy arguments for granting members of Congress the same absolute immunity afforded the President, we are restricted to what the language of the Clause will bear. Instructive in this regard is Justice Brandeis's opinion for the Court in *Long v. Ansell*, 293 U.S. 76 (1934). At issue was the meaning of the clause immediately preceding the Speech or Debate Clause: "[The Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same[.]" U.S. Const. art. I, § 6, ¶ 1.

Senator Huey Long had been sued for libel in the District of Columbia, and a summons to answer the complaint was served on him in the District during a congressional session. The Court rejected Long's argument that the constitutional protection against arrests encompasses immunity from such a summons while he

was conducting the public's business in Congress. Justice Brandeis wrote that the language of the constitutional provision protecting members of Congress from arrest "is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant." 293 U.S. at 82. Likewise, we decline to read a congressional equivalent of the *Fitzgerald* privilege into the Speech or Debate Clause.

Finally, Defendant relies on *Browning v. Clerk*, 789 F.2d 923 (D.C. Cir. 1986), the one appellate opinion dismissing an employment claim because of Speech or Debate Clause immunity. The court in that case dismissed a complaint alleging racial discrimination filed by a woman fired from her position as an official reporter of the House of Representatives. The court stated that "[t]he touchstone to determining whether the Speech or Debate Clause immunity attaches is whether the activities at issue were 'an integral part of the deliberative and communicative processes [of Congress],' *Gravel*, 408 U.S. at 625, such that the activity is legislative in character." *Id.* at 928. This observation is not controversial, coming from *Gravel*'s statement that for activities other than "speech or debate in either House" to be legislative acts, "they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625.

Browning went one step further, however, in stating, "[p]ersonnel decisions are an integral part of the legislative process to the same extent that the affected employee's duties are an integral part of the legislative

process. Thus, if the employee's duties are an integral part of the legislative process, such that they are directly assisting members of Congress in the 'discharge of their functions,' personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny." *Browning*, 789 F.2d at 928-29 (citation omitted).

We hesitate to embrace this test. A personnel decision is not a "legislative act," as defined by the Supreme Court, and is therefore not entitled to immunity. The Speech or Debate Clause therefore provides protection only if legislative acts must be proved to establish the claim challenging the personnel action. *See, e.g., Helstoski*, 442 U.S. at 487-89. Perhaps the *Browning* test is simply another way of describing this protection. After all, in *Browning* the official reporter's performance could be established only by comparing her output to what was actually said during a committee meeting. Thus, litigation of her claim would have required examination of legislative acts. *See Browning*, 789 F.2d at 930. In any event, even under the *Browning* formulation, Plaintiff here prevails, because her job duties do not satisfy the *Gravel* standard for a legislative act. Her discussions with constituents and others were not "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings." *Gravel*, 408 U.S. at 625. The "communicative processes" referred to in *Gravel* are only those within Congress itself.

V. Conclusion

We hold that Plaintiff's cause of action under the CAA is not barred by the Speech or Debate Clause. We REVERSE the dismissal by the district court and REMAND for further proceedings consistent with this opinion.

FILED
JUNE 27, 2002

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-WY-799-CB (OES)

RITA BASTIEN,

Plaintiff,

vs.

THE OFFICE OF SENATOR BEN NIGHTHORSE CAMPBELL,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This action arises from Plaintiff's allegations of discrimination and retaliation based upon her age. The matter is currently before the Court on Defendant's Motion to Dismiss and Motion to Strike Portions of the Amended Complaint. Upon reading the briefs, hearing oral argument, and being fully advised of the premises, the Court **FINDS** and **ORDERS** as follows:

Background

Plaintiff Rita Bastien is a sixty two year old Hispanic female who was employed as a staff member by Defendant, the Office of Senator Ben Nighthorse Campbell, from July 7, 1994 until she was terminated April 10, 2001. From July 7, 1994 through September 4, 2000, Plaintiff served as a Senate Aide in Defendant's Englewood, Colorado office. On September 5, 2000, Plaintiff was transferred to Defendant's Colorado Springs, Colorado office, where she was employed as District Director until her termination on April 10, 2001.

Regarding her transfer from Defendant's Englewood, Colorado office to Defendant's Colorado Springs, Colorado office, Plaintiff first argues that her transfer caused her to commute extensively, creating a financial and emotional hardship upon her as she was a life-long resident of Denver, with family in Denver. Plaintiffs second contention is that her transfer was not based upon or part of a policy of cross training or rotation, as she claims that Defendant had no such policy requiring the rotation and transfer of employees, and that other employees who travel extensively for their jobs did so voluntarily.[1] Finally, Plaintiff maintains that the person she essentially traded positions with, Ms. Lawton,[2] was given

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[1] The Plaintiff does indicate that Defendant, in special circumstances has forced the transfer of staff members. In support of this, Plaintiff alleges that Defendant forced staff members to transfer to Washington D.C. when the Senator became a Republican, which she claims essentially forced the staffers to quit.

[2] Plaintiff claims that when she was transferred from the Englewood Office to the Colorado Springs office, to become the District Director, the then Director of the Colorado Springs office, Ms. Lawton, was transferred or moved to the Englewood office to serve as a Senate Aide, in which capacity she served in until February 2002 when she was transferred back to the Colorado Springs office to serve as District Director. *See* Def.'s

preferential treatment from Defendant's Chief of Staff, Ms. Kontnik, who Plaintiff claims demonstrated a preference for the "younger" Ms. Lawton. During this period Ms. Lawton was 50.

Plaintiff contends that Defendant is attempting to justify her transfer to Colorado Springs for a number of reasons, including that Plaintiff was "a gossip, disruptive, and a rat" and that the transfer may help solve her problems. Pl.'s Com. L. 36-38. Plaintiff maintains that these reasons are pretextual. Plaintiff further claims that the reasons urged by Defendant to justify her termination--that Plaintiff was not a team player, she complained to constituents, she was rude to constituents, she took leave without permission, she contacted the Senator's ranch, she left early without approval, she had unknown whereabouts, she failed to perform outreach or provide monthly reports, she provided misleading information about her schedule, she lied about attending a defense task-force meeting, and she spent too much time on personal calls--are all recent fabrications that are merely pretextual for Defendant's discriminatory treatment toward her. Plaintiff's Com. L. 59-69.

Plaintiff contends that her involuntary transfer from the Englewood office to the Colorado Springs office, the allegedly negative treatment she received at that office, and her subsequent termination are all acts of discrimination based upon her age, and retaliation for complaints of discrimination based on her age. Relying upon the above allegations, Plaintiff brings two claims for relief under the Congressional Accountability Act ("CAA"), 2 U.S.C. § 1301 *et seq*. In her First Claim for Relief, Plaintiff alleges age discrimination and disparate treatment in violation of the Congressional Accountability Act, 2 U.S.C. § 1301 *et seq*. Plaintiff's Second

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Rebuttal of Pl.'s Supp. Resp. to Def's Mot. to Dismiss and Mot. to Strike Ex. 1.

Claim for Relief alleges Retaliation in violation of the Congressional Accountability Act, 2 U.S.C. § 1301 *et seq*.

Analysis

Rule 12(b)(1) Standard

Defendant is requesting that the Court dismiss Plaintiff's Amended Complaint in its entirety pursuant to Rule 12(b)(1) on the basis that the Speech or Debate Clause of the United States Constitution (U.S. CONST. art. I, § 6, cl. 1) bars the Court's jurisdiction over this action. In support of this motion, Defendant has submitted various materials describing the role and job duties of the Plaintiff while working for the Defendant. In response to this motion, Plaintiff has also submitted affidavits describing Plaintiff's job duties, as well as a variety of documents discussing the Congressional Accountability Act and its interaction with the Speech and Debate Clause of the United States Constitution.

"Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter." Fed.R.Civ.P. 12(b)(1)." *Neiberger v. Hawkins*, --- F.Supp.2d ---, 2002 WL 1050515, *2 (D.Colo. May, 22, 2002). "Motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may take one of two forms. First, a party may make a facial challenge to the plaintiff's allegations concerning subject matter jurisdiction, thereby questioning the sufficiency of the complaint. In addressing a facial attack, the district court must accept the allegations in the complaint as true. Secondly, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. In addressing a factual attack, the court does not presume the truthfulness of the complaint's factual allegations, but has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *U.S. v. Rodriguez*

Aguirre, 264 F.3d 1195, 1204 (10th Cir. 2001) (citing *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995)).

In the present case, Defendant's motion to dismiss for lack of jurisdiction shall be construed as a factual attack upon the complaint, as the Defendant, pursuant to of the protections afforded the by the Speech or Debate Clause, is challenging the ability of this specific Plaintiff, because of her particular job duties, to bring the present action. Therefore, the Court will allow and review the affidavits and additional materials submitted by the parties, and will not presume the truthfulness of Plaintiff's allegations. *See Sizova v. Nat. Institute of Standards & Technology*, 282 F.3d 1320, 1324 (10th Cir. 2002) (citing *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995)).

Congressional Accountability Act of 1995 2 U.S.C. § 1301 et seq.

The allegations and relief requested in Plaintiff's Amended Complaint are based upon the Congressional Accountability Act of 1995, 2 U.S.C. § 1301 *et seq.* ("CAA"). The CAA applies eleven federal employment laws, including the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 *et seq.*) to the legislative branch of the Federal Government. 2 U.S.C. § 1302(a). In addition to prohibiting discrimination on the basis of age, the CAA prohibits discrimination based on race, color, religion, sex, national origin, or disability. 2 U.S.C. § 1311(a). Further the CAA prohibits retaliation, intimidation or reprisals against covered congressional employees who exercise their rights under the CAA. 2 U.S.C. § 1317. The CAA provides the exclusive remedy for employment discrimination law suits brought against congressional offices. 2 U.S.C. § 1361(d). Thus, the present age discrimination grievance is governed solely by the procedures and remedies set forth in the CAA. *Id.* Finally, the

CAA expressly preserves and maintains the sovereign immunity granted to any Senator or Member of the House of Representatives under article I, § 6, clause 1, of the U.S. Constitution ("Speech or Debate Clause"). 2 U.S.C. § 1413.

Speech or Debate Immunity

Article I § 6 clause 1 of the United States Constitution provides the immunity commonly known as the Speech or Debate Clause, which states in pertinent part that members of Congress: "for any Speech or Debate in either House. . . shall not be questioned in any other place." U.S. CONST. art. I, § 6, cl. 1. The purpose of the Speech or Debate clause is "to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel v. United States*, 408 U.S. 606, 616 (1972). Further, it "protects Members against prosecutions that directly impinge upon or threaten the legislative process." *Id.*[3]

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[3] Although the Speech or Debate Clause specifically mentions only "Senators and Representatives," these protections have been extended to apply to the aides of Members of Congress. *Gravel v. U.S.*, 408 U.S. 606, 616 (1972) (for purposes of the Speech and Debate privilege Members of Congress and their aids are to be treated as one). Applying this principle to the present action, the Speech and Debate analysis will apply to the qualified actions of the Plaintiff, just as it applies to the qualified actions of Senator Campbell himself. As the Court stated in *Gravel*:

> [I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause--to prevent intimidation of legislators by the

The express language of the Clause addresses only "Speech or Debate," but it has been consistently held that to confine the Speech or Debate clause solely to words spoken in debate would be an unacceptably myopic view. *Gravel*, 408 U.S. at 617-18. The Speech or Debate Clause has been consistently interpreted to protect "[c]ommitted reports, resolutions, and the act of voting . . .; in short, . . . things generally done in a session of the House by one of its members in relation to the business before it." *Id.* (internal citations omitted). "Rather than giving the clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Id.* However, everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause, as "[t]he Clause has not been extended beyond the legislative sphere, and legislative acts are not all-encompassing." *Doe v. McMillan*, 412 U.S. 306, 314 (1973); *see also Gravel*, 408 U.S. at 624-25 ("[T]he Clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature").

For an act to be considered legislative in nature, and thereby garner the protections provided by the Speech or Debate Clause, the activities at issue "must be an integral part of the deliberative and communicative processes . . ." of Congress. *Gravel*, 408 U.S. at 625. In other words, "the

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> Executive and accountability before a possibly hostile judiciary will inevitably be diminished and frustrated.

Id. at 616-17. Thus, given the relationship between Senators and their aides, Members of Congress may invoke the Speech or Debate privileges which attaches to the actions of their aides.

standard for determining Speech or Debate Clause immunity is best expressed as whether the employee's duties were directly related to the due functioning of the legislative process." *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, 928-29 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 966 (1986).[4] Thus, Speech or Debate protections will not apply to a legislative functionary, such as the Plaintiff, when she is carrying out a non-legislative task. *Doe v. McMillan*, 412 U.S. at 315.

In the present action, Defendant contends that Plaintiff's duties and actions as both a Senate Aide, in the Englewood

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[4] Plaintiff contends that the proper standard to determine whether the Speech or Debate immunity prevents the present suit is to look to the actions of the Defendant and determine whether such actions were legislative or administrative in nature. In support of this argument, that Defendant's actions were administrative and therefore unable to receive Speech or Debate immunity, Plaintiff cites *Forrester v. White*, 484 U.S. 219 (1988). In *Forrester*, the Court was faced with the question of whether a state judge's personnel decision was entitled to judicial immunity at common law. In deciding that the judge's personnel decision was not entitled to common law judicial immunity the Court applied and sanctioned the functional approach for immunity questions, except for those that have been decided by express constitutional or statutory enactment. *Id.* at 224. Under the functional approach, the court is to look to the nature of the functions and actions of those officials seeking immunity. *Id.* However, in the present action, Plaintiff's reliance on the functional approach is misguided, as the present case involves the constitutional protections embodied in the Speech or Debate Clause and does not involve issues of common law immunity. This distinction is critical, as the Court in *Forrester* declined to address the issues surrounding the special constitutional considerations applicable to members of Congress, and the Court specifically distinguished constitutional immunity from common law immunity. *Id.* at 224. Therefore, as stated earlier, the examination of Plaintiff's claim herein will address whether Plaintiff's "duties were directly related to the due functioning of the legislative process." *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, 928-29 (D.C.Cir. 1986), *cert. denied*, 479 U.S. 966 (1986).

office, and a District Director, in the Colorado Springs office, were duties that directly related to the due functioning of the legislative process. In support of this view, Defendant contends that Plaintiff's duties of meeting with constituents, gathering information for the Senator, discussing constituent suggestions and then conveying them to the Senator, constitute actions that directly relate to the due functioning of the legislative process. Plaintiff responds by claiming that her actions were political rather than legislative in nature, and that although she met with constituents to discuss certain issues, she never performed legislative functions.

As stated earlier, the Speech or Debate Clause of the United States Constitution provides immunity to Members of Congress and their aides for actions, including personnel actions, that are an integral part of Congress' deliberative and communicative processes, and specifically protects actions directly related to the due functioning of the legislative process. *Browning*, 789 F.2d at 928-29 ("Personnel decisions are an integral part of the legislative process to the same extent that the affected employee's duties are an integral part of the legislative process"). However, very few courts, including the Tenth Circuit, have addressed whether the personnel actions taken by Members of Congress should receive Speech or Debate immunity. The courts that have addressed this issue have reached conflicting results. Namely, as stated above, in *Browning*, 789 F.2d 923 the court found that the personnel action of discharging the plaintiff, Browning, was protected by the Speech or Debate clause from attack because Browning's duties as an Official Court Reporter for the House of Representatives were directly related to the due functioning of the legislative process. *Id.* 928-29. Further, in *Niedermeier v. Office of Baucus*, 153 F.Supp.2d 23 (D.D.C. 2001) the district court noted that a Senator's personnel actions with respect to the Senator's Chief of Staff were protected by the Speech or

Debate Clause, as the Clause provides immunity for legislative acts, which include personnel action of members of Congress. *Id.* at 31, fn. 5. In contrast to *Browning* and *Niedermeier*, the Fifth Circuit in *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), found that the Speech or Debate Clause does not extend protection to the dismissal of staff members, as such an action does not constitute a legislative function. *Id.* at 880.

In reviewing these contrasting opinions, the Court finds the opinions of *Browning* and *Niedermeier*--that the Speech or Debate Clause protects certain personnel actions taken by Members of Congress--to be the most persuasive and accurate interpretation of the immunity afforded by the Speech or Debate Clause. The Court finds that the standards promulgated and promoted in these cases support the spirit of the Speech or Debate Clause and are in compliance with the Supreme Court's ruling in *Gravel v. U.S.*, 408 U.S. 606, 616 (1972). Further, this Court's reliance on the findings made in both *Browning*, and *Neidermeir*, are bolstered by the fact that the Fifth Circuit's opinion on the Speech and Debate issue in *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977) is of doubtful validity.

The panel decision in *Davis*, 544 F.2d 865 was vacated when the Fifth Circuit *en banc* dismissed plaintiff Davis' claims for failure to state claim. *See Davis v. Passman*, 571 F.2d 793, 795, 801 (5th Cir. 1978). Yet in doing so, the *en banc* court did not decide the Speech or Debate issue. *Id.* The *en banc* court's decision was then appealed to the United States Supreme Court, and in *Davis v. Passman*, 442 U.S. 228 (1979) the Court reversed the *en banc* court's decision. *Davis*, 442 U.S. 228. However, regarding the Speech or Debate issue, the Court stated that:

> The en banc Court of Appeals did not decide whether the conduct of respondent was shielded by the Speech or Debate Clause. In the

> absence of such a decision, we also intimate no view on this question. We note, however, that the Clause shields federal legislators with absolute immunity "not only from the consequences of litigation's results but also from the burden of defending themselves."

Id. at 235 n.11. Although the Speech or Debate issue addressed by the Fifth Circuit in the original *Davis* case was never directly addressed by either the *en banc* Fifth Circuit Court or the United States Supreme Court, the original *Davis* decision was vacated by the *en banc* court; and even though the United States Supreme Court reversed the *en banc* court's ruling, when faced with apparent opportunity to address this issue, the Court declined to do so. *Id.* Therefore, in light of this procedural history, it appears that the continued validity of the Speech or Debate issue as promulgated in the original Davis decision, *Davis*, 544 F.2d 865 (5th Cir. 1977), is of questionable validity. Nonetheless, even if the validity of the original *Davis* decision was not called into doubt by the subsequent proceedings of the *en banc* court and the United States Supreme Court, this Court finds the arguments and standards established in *Browning*, and *Neidermeir*, to be the most persuasive and accurate application of the Speech or Debate Clause to personnel actions taken by Members of Congress.

Although this Court aligns with the courts in *Browning*, and *Neidermeir*, (D.D.C. 2001) in finding that the Speech or Debate Clause provides immunity to Members of Congress and their aides for personnel actions taken with respect to employees whose duties are directly related to the due functioning of the legislative process, the Court recognizes that very few courts, including the Tenth Circuit, have addressed the full scope of this privilege as it applies to the particular job functions of a Member's aide. It appears that determining whether the actions of a particular Member of Congress' aide

will satisfy the standard of directly relating to the due functioning of the legislative process should be made on a case by case basis.

For example, in *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984), *cert denied*, 469 U.S. 1036 (1984), the court held that "personnel actions regarding the management of congressional food services are too remote from the business of legislating to rank 'within the legislative sphere' so as to receive the protections of the Speech or Debate Clause. *Id.* at 929. Yet, in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, 928-29 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 966 (1986), the court found that the duties of an Official Reporter for the House of Representatives were directly related to the due functioning of the legislative process, and as such, the personnel actions against her were nonjusticiable under the Speech or Debate Clause. *Id.* at 931. The court stated that the nature of the Official Reporter's job duties of recording testimony before the House committees, both locally and in the field, involving various matters, were directly related to the due functioning of the legislative process. *Id.* at 929. The court further noted its reasoning behind the Speech or Debate protection of personnel actions taken by Members of Congress against their employees--employees who engage in the requisite employment activities:

> Consideration of some of the questions a court would be required to pose in considering Browning's claim further illustrates the necessity of Speech or Debate Clause immunity here. For example, in assessing the adequacy of Browning's performance a court would necessarily have to inquire about matters at the very heart of the legislative process, such as the nature of the hearings to which Browning was assigned, the purposes underlying those

> hearings, and whether Browning's performance frustrated those purposes. But this sort of intrusion into the legislative sphere is exactly the sort of intrusion that the Speech or Debate Clause is designed to prevent. This is very different from a case like *Walker*, where Congressmen would be required to testify, if at all, only with respect to the operation of the House restaurants.

Id. at 930 (internal citations omitted). Additionally, in *Niedermeier v. Office of Baucus*, 153 F.Supp.2d 23, (D.D.C. 2001) the court relying on *Browning*, stated in a footnote that the personnel actions of the defendant Senator were protected because of the plaintiff's duties as chief of staff. *Id.* at 31, n.5.

Accordingly, from the above cases, it is apparent that when determining protections afforded to the personnel actions taken by a Member of Congress, the nature and scope of the impacted employee's job functions will determine if the Member is able to receive immunity provided by the Speech or Debate Clause. Noting the necessity of the case by case determination, this Court finds that the majority of Plaintiff's job duties both as a Senate Aide in Defendant's Englewood, Colorado office and as a District Director in Defendant's Colorado Springs office, were directly related to the due functioning of the legislative process. Therefore, the personnel actions taken by Defendant against the Plaintiff are afforded Speech or Debate clause immunity.

While employed as a Senate Aide in Defendant's Englewood, Colorado office from July 7, 1994 through September 4, 2000, Plaintiff's main job duty was to work with constituents and serve as a liaison between Senator Campbell and his constituents. Plaintiff admits that her job duties "involved working with constituents who had either problems

or comments to pass on to the Senator. If the problem involved a federal agency [Plaintiff's] job was to intervene on behalf of the constituent with the congressional liaison at the agency." Pl.'s Resp. to Def.'s Mot. to Dismiss and Mot. to Strike, Ex. 1 ¶5 Aff. of Rita Bastien.[5] As a Senate Aide for Senator Campbell, the Plaintiff was required to travel outside the state of Colorado to attend meetings or congressional briefings on behalf of the Senator. Def.'s Rebuttal of Pl.'s Supp. Resp. to Def.'s Mot. to Dismiss and Mot. to Strike, Ex. 2 Declaration of Ginnie Kontnik (Senator Campbell's Chief of Staff), and Ex. B, Travel Report Memorandum of Rita Bastien. Upon returning from these meetings and hearings, Senate Aides in Defendant's Office, such as Plaintiff, are required "to prepare and submit to the State Director and Chief of Staff a memorandum describing the trip, the meetings attended during the trip, any information obtained during the trip, and the Senate Aide's recommendations or conclusions, if any, for the Senator." Def.'s Rebuttal of Pl.'s Supp. Resp. to Def.'s Mot. to Dismiss and Mot. to Strike, Ex. 2 Declaration of Ginnie Kontnik. In the Travel Report Memorandum dated March 14,

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[5] Plaintiff, throughout her Affidavit, repeatedly contends that her actions did not involve or impact the legislative process. However, merely saying it's so doesn't make it so. The evidence presented by Plaintiff has not demonstrated that her duties were not related to the legislative process. In fact, the substance of Plaintiff's Affidavit indicates that her activities involving constituents clearly related to the legislative process, in that her duties included gathering and conveying information pertinent to the Senator's legislative agenda to the Defendant. Further, the Court finds that the materials provided by the Defendant to be more persuasive on the issue of Plaintiff's job duties than the mere assertions that her activities were not legislative contained in Plaintiff's Affidavit. Therefore, upon reviewing the Declarations of Catherine Lawton and Ginnie Kontnik and the update and memorandum material written by the Plaintiff (Def.'s Rebuttal of Pl.'s Supp. Response to Def's Mot. to Dismiss and Mot. to Strike Ex. 1,2, A, B), the Courts finds that the majority of the Plaintiff's job duties were directly related to the due functioning of the legislative process.

2000 regarding the INS Congressional Hearing attended by the Plaintiff, she first described the logistics and itinerary of the congressional briefing held at the National Service Center in Lincoln, Nebraska. The Plaintiff then made the following statement/recommendation:

> [T]hat the congressional briefing raised far more questions than it answered. Also, the INS would be more responsive to those in need of their services (including congress) if they were to be made accountable by congress. I feel strongly that they would respond differently if a congressional hearing were held.
>
> **This presents a good opportunity for a congressional oversight hearing; it would generate press locally and nationally regarding how this agency treats its customers. Unlike other government agencies, INS' customers pay for services through fees, a fact most folks are unaware of. An oversight hearing would also be a good forum for discussion of the newly opened INS offices on the Western Slope; some of them have met a great deal of resistance.**

Def.'s Rebuttal of Pl.'s Supp. Resp. to Def.'s Mot. to Dismiss and Mot. to Strike, Ex. B, Travel Report Mem. of Rita Bastien (emphasis in the original).

The Plaintiff's interaction with constituents and her attendance at various meetings and congressional hearings on behalf of the Senator illustrates that Plaintiff's duty was not only to provide Senator Campbell with information, but to take action on behalf of the Senator and provide him with recommendations on various legislative issues and agendas. To

question the Senator's personnel actions in this Court would impermissibly force the Court to inquire about "matters at the very heart of the legislative process" such as: 1) the nature of the conversations with constituents and the nature of the meetings and congressional briefings Plaintiff attended; 2) the purpose underlying the conversations with constituents and congressional briefings Plaintiff attended; 3) how the information Plaintiff obtained from those conversations, meetings, and congressional hearings influenced Senator Campbell's legislative agenda; and 4) whether Plaintiff's actions frustrated this agenda. *See Browning*, 789 F.2d at 930 ("in assessing the adequacy of [plaintiff's] performance a court would necessarily have to inquire about matters at the very heart of the legislative process, such as the nature of the hearings to which [plaintiff] was assigned, the purposes underlying those hearings, and whether [plaintiff's] performance frustrated those purposes. But this sort of intrusion into the legislative sphere is exactly the sort of intrusion that the Speech or Debate Clause is designed to prevent"). Accordingly, the Court finds that Plaintiff's duties as a Senate Aide for the Defendant were directly related to the due functioning of the legislative process. Therefore, Defendant is afforded the full protection of the Speech and Debate Clause for personnel actions taken against the Plaintiff while she was employed as a Senate Aide for the Defendant.

Regarding Plaintiff's employment as a District Director of Defendant's Colorado Springs office, from September 15, 2000 through April 10, 2001, Plaintiff again admits that one of her duties was to interact and work with the Senator's constituents. Pl.'s Resp. to Def.'s Mot. to Dismiss and Motion to Strike, Ex. 1 ¶5 Aff. of Rita Bastien. In addition to attending meetings with constituents, including meetings with community groups and associations to learn their feelings and opinions regarding how the Senator should vote on pending

legislation, the Plaintiff's duties included gathering information for the Senator regarding Colorado-based legislative initiatives that he is considering, and communicating all of the information from the above meetings and data gathering to the Senator. *See* Def.'s Rebuttal of Pl.'s Supp. Resp. to Def's Mot. to Dismiss and Mot. to Strike Ex. 1-Declaration of Catherine Lawton; Ex. 2-Declaration of Ginnie Kontnik; and Def's Mem. in Support of Mot. to Dismiss, Ex. A-Declaration of Dave Devendorf.

As with her job duties as a Senate Aide, Plaintiff's job functions as a District Director were directly related to the due functioning of the legislative process, as the Plaintiff was entrusted with gathering and conveying to Senator Campbell himself, and to the Defendant, information critical to the Senator's legislative agenda. Furthermore, as stated above, if this action were to proceed, the Court would be forced to impermissibly inquire into matters essential to the legislative process and the Senator's legislative agenda such, as the nature and purpose of Plaintiff's meetings with constituents, how the information obtained from these meetings impacted Senator Campbell's legislative agenda and activities, and whether Plaintiff's performance of her job duties frustrated that agenda or misguided the Senator as to the will of his constituents. Accordingly, the Court finds that Plaintiffs duties as a District Director for the Defendant were directly related to the due functioning of the legislative process. Therefore, Defendant's personnel actions against the Plaintiff while she was District Director are immunized by the full protections afforded in the Speech and Debate Clause of the United States Constitution.

Conclusion

As cited earlier, the Speech or Debate Clause, Article I § 6 clause 1, of the United States Constitution does not immunize all congressional personnel actions, as not all congressional employees engage in job functions that are directly related to the due functioning of the legislative process. However, for the aforementioned reasons, the Court finds that the majority of Plaintiff's job duties while employed as a Senate Aide and District Director for the Defendant were directly related to the due functioning of the legislative process. Thus, Defendant's employment actions, of transferring and terminating the Plaintiff are immunized by the protections afforded by the Speech or Debate Clause of the United States Constitution.

Therefore, the Court **HEREBY ORDERS** that the Defendant's Motion to Dismiss is **GRANTED** and Plaintiff's claims are **DISMISSED WITH PREJUDICE**. Further, Defendant's alternative Motion to Strike Portions of the Amended Complaint is **HEREBY DENIED** as **MOOT**.

Dated this 27th day of June, 2002.

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Clarence A. Brimmer,
United States District Judge